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Divorce - Maintenance - Cohabitation Alone is Insufficient Ground for Termination of Maintenance. (Van Gorder v. Van Gorder)

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DIVORCE — Maintenance — Cohabitation Alone Is Insufficient Ground for Termination of Maintenance. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 327 N.W.2d 674 (1983).

In *Van Gorder v. Van Gorder*[1] the Wisconsin Supreme Court held that a divorced person's continuous cohabitation with another person is not alone a sufficient ground to terminate maintenance payments. The court stated that maintenance payments can be modified only on the basis of a change in the financial circumstances of the parties.[2] Cohabitation is only one factor to consider in determining whether there is a change in a recipient former spouse's financial situation.[3]

By so holding in *Van Gorder*, the court made a marked shift from the rule it set forth in 1975 in *Taake v. Taake*.[4] In *Taake* the court revoked a cohabiting ex-spouse's maintenance payments and held that a divorced spouse's cohabitation with another can be acknowledged as a change of circumstances sufficient to affect the former spouse's responsibility to provide alimony.[5] The *Taake* court specifically rejected the cohabiting spouse's argument that the change of circumstances must relate only to a change in the financial situation of the parties.[6]

Justice Callow[7] dissented from the *Van Gorder* holding, maintaining that more than just the financial situations of the parties must be considered.[8] The dissent viewed the ma-

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1. 110 Wis. 2d 188, 327 N.W.2d 674 (1983).
2. *Id.* at 195, 327 N.W.2d at 677.
3. *Id.* at 199, 327 N.W.2d at 679.
4. 70 Wis. 2d 115, 233 N.W.2d 449 (1975).
5. *Id.* at 121, 233 N.W.2d at 453.
6. *Id.* at 121, 233 N.W.2d at 452-53. The dissent in *Taake* disputed this, stating that "the change in circumstances that must be proved hinges upon the changed needs or changed *financial* resources of the parties." *Id.* at 123, 233 N.W.2d at 453 (emphasis added).
7. Justice Ceci joined in the dissent.
8. *Van Gorder*, 110 Wis. 2d at 202, 327 N.W.2d at 680. Justice Callow stated:

> I read *Taake* to declare that it was proper for the trial court to terminate maintenance because of the recipient ex-spouse's continuous cohabitation with another man. The dissent vigorously argued that financial need should be the controlling factor. The majority has now moved to the position taken by the dissenters in *Taake*.

Id. at 202, 327 N.W.2d at 681.

jority's result as a violation of both the spirit[9] and letter[10] of the newly reformed divorce code. The dissent also argued that the result encourages unlawful behavior[11] and erodes the institution of marriage.[12]

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9. *Id.* at 204-05, 327 N.W.2d at 682. The dissent quoted the declarations of intent as set forth by the legislature in WIS. STAT. § 765.001 (1979), which identified chapters 765 to 768 as "The Family Code" and provided:

> **765.001 Title, intent and construction of chs. 765 to 768.** (1) TITLE. Chapters 765 to 768 may be cited as "The Family Code".
>
> (2) INTENT. It is the intent of chs. 765 to 768 to *promote the stability and best interests of marriage and the family.* Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.
>
> (3) CONSTRUCTION. *Chapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2).*

Van Gorder, 110 Wis. 2d at 200-01, 327 N.W.2d at 680 (emphasis added).

10. *Van Gorder*, 110 Wis. 2d at 202, 327 N.W.2d at 681. The dissent stated that the majority opinion "ignores the authority granted to trial courts by sec. 767.26(10), Stats." *Van Gorder*, 110 Wis. 2d at 205, 327 N.W.2d at 682. WIS. STAT. § 767.26 (1979) provided in relevant part: "Upon every judgment of annulment, divorce or legal separation . . . the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering: . . . . (10) such other factors as the court may in each individual case determine to be relevant." Presumably, the dissent was implying that just as the court may consider these "other factors" in awarding maintenance, so too should it consider them when deciding whether maintenance should be revised pursuant to WIS. STAT. § 707.32(1) (1981-1982).

11. The fornication statute, WIS. STAT. § 944.15 (1981-1982), provides: "Whoever has sexual intercourse with a person not his or her spouse is guilty of a Class A misdemeanor." The lewd and lascivious behavior statute, WIS. STAT. § 944.20 (1981-1982), provides in part: "Whoever does any of the following is guilty of a Class A misdemeanor: . . . . (3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse." *See also* Fineman, *Law and Changing Patterns of Behaviour: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 278-315 (extensive analysis of the interpretation and application of these and other statutes).

12. *Van Gorder*, 110 Wis. 2d at 204, 327 N.W.2d at 682. The dissent stated:

> The beauty of marriage is tarnished if it is to be a financial trap. The majority opinion in this case discourages marriage. A first marriage will be avoided because of the possibility of permanent financial obligation for maintenance if the marriage fails. A second marriage will be avoided because it would terminate the maintenance awarded at the time of the termination of the first marriage.

I. STATEMENT OF THE CASE

After seventeen years of marriage, Edwin and Shirley Van Gorder divorced in 1971. As part of their divorce action the parties executed an agreement which, among other things, obligated Mr. Van Gorder to pay maintenance of $700 per month to Mrs. Van Gorder.[13] No time limit or cutoff date was established for these payments. Following the divorce, Mr. Van Gorder made all required maintenance payments until April of 1981. In April he stopped paying maintenance and filed a motion to amend the divorce judgment. He supported his motion by an affidavit which stated that his former wife was living in a "de facto marital relationship" and was supporting her male companion with maintenance payments made by Mr. Van Gorder.[14]

At the hearing on the motion, Mrs. Van Gorder stipulated on the record that she had cohabited continuously with Melvin Brenner since September 1, 1979. On that date Mr. Brenner moved into Mrs. Van Gorder's apartment. They each testified that their respective budgets during cohabitation remained virtually identical to their precohabitation budgets. The one exception was that while Mrs. Van Gorder continued to pay the entire rental fee of $286 per month on her apartment, Mr. Brenner lived rent free.[15]

The trial court found that Mrs. Van Gorder had "engaged in continuous cohabitation with a man"[16] outside of marriage and

> [t]hat the manner and extent of said cohabitation including, but not limited to, the fact the man with whom plaintiff is cohabiting has the ability to contribute to the support of the plaintiff, is a sufficient change of circumstances to affect the defendant's responsibility to provide alimony for plaintiff's support.[17]

Id. at 204, 327 N.W.2d at 205.

13. *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 191, 327 N.W.2d 674, 675 (1983).

14. *Id.* at 191, 327 N.W.2d at 675-76.

15. *Id.* at 191-92, 327 N.W.2d at 676. The court stated: "Mr. Brenner and Mrs. Van Gorder had agreed before they began cohabiting that Mr. Brenner would pay no rent so that he could set aside some money to pay for the education of two of his children now attending college." *Id.* at 192-93, 327 N.W.2d at 676.

16. *Id.* at 190, 327 N.W.2d at 675.

17. *Id.* Note that this is substantially the holding in Taake v. Taake, 70 Wis. 2d 115, 121-22, 233 N.W.2d 449, 453 (1975).

The court then ordered Mr. Van Gorder relieved of his obligation to pay maintenance to Mrs. Van Gorder.[18]

Mrs. Van Gorder appealed and the Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court. The supreme court reversed, finding that the trial court had abused its discretion.[19] The case was remanded to the trial court for further proceedings consistent with the court's opinion.

II. COHABITATION AND THE WISCONSIN DIVORCE CODE

Cohabiting couples represent a growing minority.[20] One attraction of this lifestyle is the informality with which it can be carried out. Cohabitation can begin without a marriage license and can end without a divorce decree.[21] But, as the *Van Gorder* case clearly shows, cohabiting couples are not entirely unaffected by the legal system and its formalities.[22]

Increasing incidents of cohabitation coupled with a growing divorce rate[23] present a problem when a maintenance receiving spouse enters into a postdivorce relationship. If this relationship culminates in remarriage, as would have been almost certain twenty years ago, the obligation of

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18. *Van Gorder*, 110 Wis 2d at 190, 327 N.W.2d at 675.

19. *Id.* at 199, 327 N.W.2d at 680.

20. One source estimated that between six and eight million Americans were cohabiting in 1976. *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976). *See also* Fineman, *supra* note 11, at 275 n.1 ("From 1960 to 1970, the number of cohabitors increased eightfold.") (citing U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, Table 11 at 4B; *id.* 1960 CENSUS, Table 15 at 4B); Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L.J. 453, 453-60 (1976) (discussion of increasing acceptability of cohabitation).

21. *But see* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (discussing legal rights and liabilities of cohabiting couples to each other). *See generally* Comment, *Marvin v. Marvin: Five Years Later*, 65 MARQ. L. REV. 389 (1982).

22. For further discussion of the legal ramifications of cohabitation, see G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW (1979); T. IHARA & R. WARNER, THE LIVING TOGETHER KIT (1978); M. KING, COHABITING HANDBOOK (1975); N. LAVORI, LIVING TOGETHER, MARRIED OR SINGLE: YOUR LEGAL RIGHTS (1976); C. MASSEY & R. WARNER, SEX, LIVING TOGETHER AND THE LAW (1974); E. VAN DUESEN, CONTRACT COHABITATION: AN ALTERNATIVE TO MARRIAGE (1974).

23. *Divorce American Style*, Newsweek, Jan. 10, 1983, at 42, 45 (stating that in the 1980's there is one divorce for every two marriages).

the ex-spouse to provide maintenance would end.[24] But today the courts are facing a new problem: what becomes of a spouse's obligation to provide maintenance when the recipient ex-spouse enters into a relationship involving cohabitation?

Years ago the answer to this problem would have been obvious:

> [I]f the wife, without the fault of the husband and without any adequate excuse of palliation, deliberately chooses a life of shame and dishonor . . . the court may make the misconduct of the wife the ground for cutting off all alimony, or for reducing the same . . . [T]he courts of our state do not permit vice to flaunt its banner before them unchallenged.[25]

For many years, Wisconsin case law[26] and statutes[27] recognized marital misconduct as being a major factor in the determination of whether maintenance should be granted or terminated. During these years Wisconsin adhered to the "fault" concept of divorce.[28]

The emphasis and purpose of the Wisconsin divorce statutes shifted in 1977 with the passage of the Divorce Reform Act.[29] The purpose of the Act is in part "to move away from assigning blame for a marriage failure."[30] The current property division statute is evidence of this shift in that it empowers a court to divide property based upon a number of factors but "without regard to marital misconduct."[31] A primary purpose of the reformed statutes is to give attention and consideration to the respective financial situations of the parties. This purpose is expressed in both the property divi-

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24. WIS. STAT. § 767.32(3) (1981-1982) (termination of maintenance upon the payee's remarriage).

25. Weber v Weber, 153 Wis. 132, 138, 140 N.W. 1052, 1055 (1913).

26. Haritos v. Haritos, 185 Wis. 459, 464, 202 N.W. 181, 183 (1925) ("Upon proof of adulterous conduct subsequent to the judgment of divorce, it is appropriate that the court take into consideration such conduct in continuing or disallowing alimony.").

27. WIS. STAT. § 247.26 (1975), *repealed by* Divorce Reform Act, ch. 105, § 42, 1977 Wis. Laws 560, 572, provided in part: "[N]o alimony shall be granted to a party guilty of adultery not condoned . . . . "

28. *See, e.g.*, Greco v. Greco, 73 Wis. 2d 220, 243 N.W.2d 465 (1976) (cruel and inhuman treatment); Freeman v. Freeman, 31 Wis. 235 (1872) (adultery).

29. Ch. 105, 1977 Wis. Laws 560.

30. *Id.* § 1(1).

31. WIS. STAT. § 767.255 (1981-1982).

sion[32] and maintenance payments[33] statutes. It is also supported by existing case law.[34]

This shift in emphasis appears to limit a Wisconsin court's consideration of the maintenance receiving spouse's postmarital misconduct. The majority decision in *Van Gorder* analyzed the situation and came to a result consistent with the spirit of the reformed divorce code.[35] But the *Van Gorder* dissent raised a number of strong arguments which the majority opinion failed to meet.[36] The remainder of this note will discuss how other jurisdictions have handled the situation, state and analyze the *Van Gorder* majority and dissenting opinions and propose an alternative means to deal with similar future situations.

III. TREATMENT OF COHABITATION IN OTHER JURISDICTIONS

A. Legislative Response

A number of states have passed maintenance statutes which deal with cohabiting spouses.[37] The statutes of California,[38] New York[39] and Illinois[40] constitute a representa-

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32. *Id.* (The 13 factors the statute gives the courts to use in determining how property is to be divided emphasize the financial aspects.).

33. *Id.* § 767.26 (The 10 factors the statute gives the courts to use in determining how maintenance is to be awarded emphasize the financial aspects).

34. *See* Thies v. MacDonald, 51 Wis. 2d 296, 302, 187 N.W.2d 186, 189 (1971), where the court stated: "The court's power to modify the provisions of the judgment of divorce is . . . to adapt the decree to some distinct and definite change in the *financial* circumstances of the parties . . . . " (emphasis added).

35. Van Gorder v. Van Gorder, 110 Wis. 2d 188, 195-96, 327 N.W.2d 674, 678 (1983). The court quoted the Legislative Council Notes to the Divorce Reform Act, WIS. STAT. ANN. § 767.26 at 210 (Supp. 1981): "The Divorce Reform Act requires the court to consider each parent's 'earning capacity' and 'total economic circumstances' in deciding whether a change of circumstances has occurred." *Van Gorder*, 110 Wis. 2d at 195-96, 327 N.W.2d at 678.

36. *See infra* notes 85-90 and accompanying text.

37. For further discussion of these cohabitation statutes, see Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 644-49 (1981-1982) [hereinafter cited as Oldham, *Cohabitation*]; Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse upon His or Her Right to Continue to Receive Alimony*, 17 J. FAM. L. 249, 256-61 (1978-1979) [hereinafter cited as Oldham, *Effect of Unmarried Cohabitation*]; Wadlington, *Sexual Relations after Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 268-69 (1977); Comment, *The Effect of Third Party Cohabitation on Alimony Payments*, 15 TULSA L.J. 772, 780-89 (1980); Annot., 98 A.L.R.3d 453 (1980).

38. *See infra* note 41.

39. *See infra* note 48.

40. *See infra* note 53.

tive sample of these statutes. Each statute is different; each has a distinct focus and emphasis.

The California statute[41] focuses on the financial situation of the cohabiting spouse. Maintenance continues as long as the ex-spouse shows a financial need. But upon evidence of cohabitation, the statute creates a rebuttable presumption that the maintenance recipient's support needs have decreased. The cohabiting spouse bears the burden of proving that his or her support needs have not diminished.

The California Court of Appeal applied the statute in *Leib v. Leib*.[42] In *Leib* the former wife was living with another man while receiving maintenance from her ex-husband. The ex-husband moved the court to have his support obligations terminated. Although the trial court denied the motion, the appellate court reversed and ordered the motion granted, holding that the ex-wife had no right to give away her domestic services and then collect spousal support from her former husband in an amount sufficient to enable her to make a gift of such services.[43] The court of appeal stated that the ex-wife created a status of apparent continuing need for maintenance by giving away these services.[44] The court concluded that Mrs. Leib's evidence was insufficient to overcome the presumption of decreased need.

In *Thweatt v. Thweatt*[45] the California Court of Appeal held the cohabitation statute inapplicable when the ex-wife

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41. CAL. CIV. CODE § 4801.5 (West Supp. 1981) provides in part:

(a) Except as otherwise agreed to by the parties in writing, there shall be a rebuttable presumption, affecting the burden of proof, of decreased need for support if the supported party is cohabiting with a person of the opposite sex. Upon such a finding of changed circumstances, the court may modify the payment of support as provided for in [the maintenance statute].

(b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

42. 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978). *See also* Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 257-60 (further analysis of *Leib*).

43. *Leib*, 80 Cal. App. 3d at 642, 145 Cal. Rptr. at 770.

44. *Id.* at 643, 145 Cal. Rptr. at 771. *But see In re* Marriage of Sasson, 129 Cal. App. 3d 140, 180 Cal. Rptr. 815 (1982) (statute is inapplicable to cohabiting ex-wife when parties had previously agreed that spousal support was not to be modified upon any ground).

45. 96 Cal. App. 3d 530, 157 Cal. Rptr. 826 (1979).

was boarding with two men. In *Thweatt* there was no evidence of a sexual relationship, a romantic involvement or a homemaker-companion relationship between either of the men and the ex-wife.[46] The court's analysis centered on the meaning of "cohabitation" as used in the California statute. Interpreting the legislature's intent in using that word, the court stated that it was not enough to show that the recipient spouse and the person of the opposite sex "were merely sharing living accomodations."[47] Thus, it found the statute inapplicable and the rebuttable presumption inoperative.

The New York cohabitation statute[48] provides for maintenance termination upon the satisfaction of a two-pronged test: (1) the maintenance recipient lives with a member of the opposite sex, and (2) the two people hold themselves out as husband and wife. Unlike the California statute, the New York statute does not consider the financial situation of the cohabiting ex-spouse. Instead, the statute looks to the realities of the relationship and requires a "holding out" as husband and wife. In effect, New York gives recognition to de facto marriages.[49]

This two-pronged test was not met in *Northrup v. Northrup*.[50] In *Northrup* the New York Court of Appeals denied a former husband's request that his support obligations to his ex-spouse be terminated. At the time, the ex-wife was cohabiting with another man. The court, finding no evidence as to the second prong of the statutory test, stated that an absence of proof does not justify an inference that cohab-

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46. *Id.* at 534, 157 Cal. Rptr. at 829.

47. *Id.* at 535, 157 Cal. Rptr. at 829.

48. N.Y. DOM. REL. LAW § 248 (McKinney 1977) provides in part:

> The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife.

49. *See* Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 260-65 (discussion of the "holding out" requirement). *See also* H. FOSTER & D. FREED, LAW AND THE FAMILY: ECONOMIC ASPECTS, CUSTODY, TAXES § 26:19 (Vol. 2 Supp. 1982) (additional New York cases interpreting the statute).

50. 43 N.Y.2d 566, 373 N.E.2d 1221, 402 N.Y.S.2d 997 (1978). *See also* Note, *Alimony Modification: Cohabitation of Ex-Wife with Another Man*, 7 HOFSTRA L. REV. 471 (1978-79) (additional analysis of *Northrup* and the New York statute).

itation alone manifests a holding out.[51] It specifically rejected the idea that the "lifestyles" of the cohabiting parties could constitute a holding out.[52]

The Illinois statute[53] provides for the termination of maintenance upon the showing that the recipient is cohabiting with another person on a continuing conjugal basis. The statute makes no mention of financial considerations, nor does it require a holding out. It can be most accurately described as a "morals" statute.

The Appellate Court of Illinois found the statute applicable in *Halford v. Halford*.[54] In terminating maintenance, the Illinois court focused on the continuing nature of the wife's cohabitation and emphasized the conjugal nature of the relationship. The continuing basis requirement was met in that the couple had lived together for over three years. The couple's admission to several instances of sexual intimacy, together with substantial circumstantial evidence of an intimate relationship, was a major factor in the court's determination that the relationship was of a conjugal nature.[55]

In *Bramson v. Bramson*[56] the Appellate Court of Illinois found that an ex-wife's cohabitation was conjugal in nature. The court held the statute inapplicable, however, because the cohabitation was not continuous. The couple lived together for only four months, and the former wife's testimony that the living arrangement was temporary was uncontroverted.[57]

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51. *Northrup*, 43 N.Y.2d at 571, 373 N.E.2d at 1223, 402 N.Y.S.2d at 999.

52. *Id.* at 571, 373 N.E.2d at 1224, 402 N.Y.S.2d at 999 (citing with disapproval *In re* Anonymous, 90 Misc. 2d 801, 804, 395 N.Y.S.2d 1000, 1002 (N.Y. Fam. Ct. 1977)).

53. ILL. ANN. STAT. ch. 40, § 510(b) (Smith-Hurd Supp. 1982-1983) provides: "Unless otherwise agreed by the parties in a written separation agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated . . . if the party receiving maintenance, cohabits with another person or a resident, continuing conjugal basis."

54. 70 Ill. App. 3d 609, 388 N.E.2d 1131 (1979).

55. *Id.* at __, 388 N.E.2d at 1135. *See also* Jarett v. Jarett, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (Illinois Supreme Court established a presumption that a change in child custody was warranted where custodial parent was engaged in open cohabitation), *cert. denied*, 449 U.S. 1067 (1980).

56. 83 Ill. App. 3d 657, 404 N.E.2d 469 (1980).

57. *Id.* at __, 404 N.E.2d at 473.

B. Judicial Response

Judicial response in states without cohabitation statutes can be categorized in a similar way as the response from states having cohabitation statutes.[58] The majority view emphasizes the recipient's financial circumstances[59] while a minority of states apply a moral standard in determining whether or not maintenance should be terminated.[60]

Economic need is the emphasis of the test set forth by the Superior Court of New Jersey in *Garlinger v. Garlinger*.[61] In *Garlinger* the ex-wife's boyfriend moved into her home. The boyfriend contributed nothing toward the support of Mrs. Garlinger. Mrs. Garlinger's former husband argued that the illicit relationship was sufficient to negate his obligation to provide maintenance. The court noted that the minority position in such a situation is that a former wife's postdivorce immoral conduct is enough to justify a modification or termination of maintenance payments. It rejected the minority's view as being based on distinctly punitive grounds.[62] Instead, the court held that the subsequent unchastity of the wife is not by itself cause for terminating or reducing her maintenance.[63] The court stated that cohabitation is a factor for consideration only to the extent it may bear upon the amount of and the necessity for the allowance.

In *Mertens v. Mertens*[64] the Minnesota Supreme Court set aside a trial court order which had terminated an ex-wife's maintenance payments. The trial court's order primarily focused on the fact of the ex-wife's cohabitation with

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58. For further discussion of these nonstatutory state cases, see Oldham, *Cohabitation*, *supra* note 37, at 649-51; Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 254-55; Comment, *supra* note 37, at 777-80; Note, *Proof of Former Wife's Unchastity as a Factor in a Proceeding to Modify an Alimony Award Based upon Agreement of the Parties*, 8 U. TOL. L. REV. 783 (1977); Annot., 98 A.L.R.3d 453 (1980).

59. Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 254. *See also* Garlinger v. Garlinger, 137 N.J. Super. 56, __, 347 A.2d 799, 801 (1975) (cases following the majority or minority rule).

60. Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 254. *See also* Garlinger v. Garlinger, 137 N.J. Super. 56, __, 347 A.2d 799, 801 (1975) (cases following the majority or minority rule).

61. 137 N.J. Super. 56, 347 A.2d 799 (1975).

62. *Id.* at __, 347 A.2d at 802.

63. *Id.* at __, 347 A.2d at 803.

64. 285 N.W.2d 490 (Minn. 1979).

another man. The supreme court held that cohabitation alone was insufficient reason to terminate the maintenance.[65] It stated that cohabitation was only a factor insofar as it improved an ex-spouse's economic well-being.

In *McRae v. McRae*[66] the Mississippi Supreme Court revealed early in its opinion the moral undertones of its analysis by framing the issue as what effect, if any, the postmarital adultery of a former wife has upon her right to continued maintenance from her former husband.[67] After her divorce, the ex-wife in *McRae* cohabited with a man for just over one year. The cohabitation ended when the former husband filed a petition praying for a termination of his maintenance obligations.[68] The supreme court held that the trial court was correct in stating that the ex-wife "forfeited her right to future alimony the same as if she had been married to him."[69] The court disclosed the reasons for its order permanently terminating the husband's support obligations by stating:

> We are of the further view that her abode with the man for more than a year, openly living in adultery, enduring the embarrassment of it, and, in addition by silence, setting that kind of example before her daughters constituted a material change in the circumstances of the parties and that, by her unconscionable conduct, she forfeited her right to future alimony by her repudiation of the right thereto.[70]

IV. THE *VAN GORDER* OPINIONS

A. The Majority

Writing for the majority, Justice Steinmetz first discussed the limitations and justifications of maintenance in Wisconsin. Maintenance " 'is designed to maintain a party at an appropriate standard of living . . . until [that] party . . . has reached a level of income where maintenance is no longer necessary.' "[71] Its justification arises from the obligation of a former spouse to support the other spouse in the

65. *Id.* at 491.
66. 381 So. 2d 1052 (Miss. 1980).
67. *Id.* at 1053.
68. *Id.*
69. *Id.* at 1056.
70. *Id.* at 1055.
71. Van Gorder v. Van Gorder, 110 Wis. 2d 188, 193, 327 N.W.2d 674, 676

manner to which that spouse was accustomed during the marriage.[72] The court noted that maintenance payments may be revised after judgment.[73] After stating that such a revision could be prompted only by a change in the recipient's circumstances, the court used both case law[74] and the Legislative Council Notes to the 1977 Divorce Reform Act[75] to support its proposition that this change in circumstances must relate to a change in the parties' financial circumstances.

The court also analyzed its decision in *Taake v. Taake*,[76] a case of first impression in Wisconsin. In *Taake* the recipient spouse was cohabiting with another man. The trial court terminated Mrs. Taake's maintenance payments in part because it found that she was living in a "de facto marriage relationship."[77] The supreme court affirmed, finding that this was a sufficient change in circumstances to support the trial court's decision.[78] Neither court in *Taake* argued that the change in circumstances must relate to the parties' finances, although the supreme court noted that Mrs. Taake and the third party had arrangements for mutual support. In *Van Gorder*, however, the court maintained that Mr. Van Gorder misinterpreted *Taake* when he asserted that cohabitation alone is a sufficient change of circumstances to justify a termination of maintenance payments.[79] The court reiter-

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(1983) (quoting Vander Perren v. Vander Perren, 105 Wis. 2d 219, 230, 313 N.W.2d 813, 818 (1982)).

72. *Van Gorder*, 110 Wis. 2d at 193, 327 N.W.2d at 677 (citing Jordan v. Jordan, 44 Wis. 2d 471, 475, 171 N.W.2d 385, 388 (1969)).

73. *Van Gorder*, 110 Wis. 2d at 194, 327 N.W.2d at 677. *See* WIS. STAT. § 767.32(1) (1981-1982).

74. Theis v. MacDonald, 51 Wis. 2d 296, 302, 187 N.W.2d 186, 189 (1971). *See supra* note 34.

75. *See supra* note 35.

76. 70 Wis. 2d 115, 233 N.W.2d 449 (1975).

77. *Id.* at 118, 233 N.W.2d at 451. Note that Wisconsin abolished common-law marriage in 1917. Van Schaick v. Van Schaick, 256 Wis. 214, 216, 40 N.W.2d 588, 589 (1949). But for judicial recognition of de facto marriages, see State *ex rel.* Susedik v. Knutson, 52 Wis. 2d 593, 191 N.W.2d 23 (1971) (length of cohabitation coupled with representations made during the period of cohabitation served to bar raising of statute of limitations in paternity action).

78. *Taake*, 70 Wis. 2d at 122, 233 N.W.2d at 453.

79. *Van Gorder*, 110 Wis. 2d at 197, 327 N.W.2d at 678. For further criticism of the court's analysis of *Taake*, see *infra* text accompanying notes 91-96.

ated that the change in circumstances must be a financial one.

The supreme court advised trial courts to look closely at cohabitation arrangements. It warned that cohabitors should not be able to fashion their relationship and finances in a manner that is intended solely to prevent the modification of maintenance payments.[80] In conclusion, the court dismissed as incredible the dissent's argument that the decision will discourage future initial marriages.[81] It also held the criminal code provisions inapplicable because the legislature had not referenced them into the Family Code.[82]

Chief Justice Beilfuss, the author of the *Taake* opinion, concurred with the majority's result in *Van Gorder*.[83] He also read *Taake* as holding that cohabitation alone is insufficient to justify a termination of maintenance payments.[84]

B. The Dissent

Justice Callow dissented,[85] vigorously attacking both the reasoning and result of the majority opinion. He viewed the majority opinion as opening the door to potential abuse. To prevent this abuse, he maintained that the court must consider more than just the parties' financial circumstances.[86] To support this contention he cited both the language of the maintenance statute and the legislature's intent in passing the reformed Family Code.[87] He maintained that these authorities empower a court to look beyond finances in determining whether a party's maintenance should be terminated.

Justice Callow pointed out that cohabitation violates

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80. *Van Gorder*, 110 Wis. 2d at 197, 327 N.W.2d at 678-79.

81. *Id.* at 198-99, 327 N.W.2d at 679.

82. *Id.* at 199, 327 N.W.2d at 679.

83. *Id.* at 199, 327 N.W.2d at 680 (Beilfuss, J., concurring).

84. *Id.* at 200, 327 N.W.2d at 680.

85. *Id.* (Callow, J., dissenting).

86. *Id.* Justice Callow's approach would require termination of the former spouse's legal obligation to provide maintenance. This seems to assume that the third party acquires an obligation to contribute to the expenses of cohabitation. This result would raise the issue of whether either cohabitor could seek palimony from the other if this relationship ends. *See* Comment, *supra* note 21.

87. *See supra* notes 9-10.

Wisconsin criminal statutes.[88] He viewed the majority opinion as rewarding illegal behavior. He also analyzed *Taake*, and, taking issue with the majority's interpretation of that case, saw *Van Gorder* as overruling it.[89] Justice Callow concluded that marriage and morality are the losers under *Van Gorder*, stating that a first marriage will be avoided because of the possibility of a permanent financial obligation for maintenance if the marriage fails, and a second marriage will be avoided because it would terminate the maintenance awarded at the time the first marriage ended.[90]

V. CRITIQUE

None of the *Van Gorder* opinions used the *Taake* case correctly. The *Van Gorder* majority and concurring opinions denied *Taake* held that cohabitation by itself can constitute a sufficient change of circumstances justifying a termination of maintenance payments. But their denial contradicts a plain reading of the case. In support of its holding, the *Taake* court cited and quoted extensively from two earlier Wisconsin cases that gave consideration to the revision of maintenance based upon subsequent misconduct of the divorced spouse.[91] The trial court's decision, which the supreme court affirmed, was in fact based upon the wife's "misconduct."[92] The *Van Gorder* court's denial of *Taake*'s

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88. *Van Gorder*, 110 Wis. 2d at 201, 327 N.W.2d at 680 (Callow, J., dissenting). *See supra* note 11.

89. *Van Gorder*, 110 Wis. 2d at 201-03, 327 N.W.2d at 680 (Callow, J., dissenting).

90. *Id.* at 203-04, 327 N.W.2d at 681-82. The accuracy of this statement is supported by the *Van Gorder* trial record:

> With respect to the financial arrangement, Mrs. Van Gorder's comment that it was not unfair for her to live with someone and accept alimony because her financial needs were unaffected, combined with Mr. Brenner's statement that he was not considering marriage because it would jeopardize Mrs. Van Gorder's financial security, namely alimony, clearly indicate they have designed their relationship for the specific purpose of enjoying a marital type relationship while avoiding the termination of alimony.

Brief for Respondent at 6-7, Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (1983).

91. *See* Haritos v. Haritos, 185 Wis. 459, 202 N.W. 181 (1925); Weber v. Weber, 153 Wis. 132, 140 N.W. 1052 (1913). *See also supra* text accompanying notes 25-26.

92. Taake v. Taake, 70 Wis. 2d 115, 118, 233 N.W.2d 449, 451 (1975). The supreme court, citing *Weber* and *Haritos* for support, stated: "The trial court also concluded that Mrs. Taake's legal *misconduct* was the kind of misconduct which this

holding contradicts *Taake*'s universal interpretation. *Taake* is widely cited in cases,[93] statutes[94] and scholarly essays[95] for the proposition that cohabitation, with nothing more, is sufficient to terminate maintenance. It is almost as if the court could not bring itself to admit that the *Taake* decision was based upon moral grounds.

The dissent also misused the *Taake* decision. Although the dissent correctly stated the *Taake* holding, it failed to place the case in its proper context. *Taake* arose in 1975. The Family Code was not reformed until 1977. Prior to the reform, Wisconsin adhered to the fault concept of divorce, and the courts considered marital misconduct of either party as a maintenance factor.[96] The *Taake* court correctly applied those statutes. Thus, the *Van Gorder* dissent's reliance on the *Taake* holding was misplaced. *Taake* interpreted statutes which were later repealed by the Divorce Reform Act; *Van Gorder* interpreted the reformed statutes.

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court has heretofore recognized as warranting a change or elimination of alimony." (emphasis added). Indicative of the trial court's emphasis on fault was its statement in a memorandum decision that "[d]efendant has been living in sin . . . for some time in the past. She plans to continue living in sin . . . . This gross misconduct ought to deprive defendant of alimony from plaintiff at present and at all times in the future." Brief of Appellant at App. 104, Taake v. Taake, 70 Wis. 2d 115, 233 N.W.2d 449 (1975). The supreme court considered other factors, such as custody being transferred to the ex-husband, but it, too, focused on the ex-wife's "misconduct." *Taake*, 70 Wis. 2d at 121-22, 233 N.W.2d at 453.

93. *See, e.g.,* Alibrando v. Alibrando, 375 A.2d 9, 13 (D.C. 1977); Mitchell v. Mitchell, 418 A.2d 1140, 1142 (Me. 1980) (disapproving *Taake*); Litwack v. Litwack, 289 Pa. Super. 405, __, 433 A.2d 514, 516 (1981) (*Taake* cited as not applicable); Myhre v. Myhre, 296 N.W.2d 905, 908 (S.D. 1980) (disapproving *Taake*). But see Kestly v. Kestly, No. 81-2216, slip op. at 8 (Wis. Ct. App. Nov. 23, 1982, unpublished, limited precedential opinion), where the court stated: "*Taake* requires only that the moving party show the ex-spouse has entered into such a marriage-like relationship that he or she might be receiving some financial benefit from a third party." In *Kestly* the ex-husband motioned the court to terminate his former wife's maintenance award on the ground that she was cohabiting with a man in a marriage-like relationship. The court of appeals affirmed the trial court's holding that there was no substantial change in circumstances which would justify a reduction or termination of the stipulated maintenance payments.

94. *See, e.g.*, ILL. ANN. STAT. ch. 40, § 510(b) historical and practice notes (Smith-Hurd 1980).

95. *See, e.g.*, Oldham, *Cohabitation*, *supra* note 37, at 622 n.21; Oldham, *Effect of Unmarried Cohabitation*, *supra* note 37, at 254 n.21; Note, *supra* note 58, at 787. *But see* Annot., 98 A.L.R.3d 453 (1980) (categorizing Wisconsin as being among those states which require something more than just cohabitation).

96. *See supra* notes 25-27 and accompanying text.

The majority also failed in its analysis of the criminal statutes. The court dismissed the statutes as being inapplicable because the legislature did not reference them into the Family Code.[97] This explanation fails to meet the argument that a divorce court is a court of equity. By violating the laws of the state, a cohabiting ex-spouse is not entering the court with "clean hands"; thus, a court of equity could deny relief to the cohabitor.[98]

In addition, the majority did not attempt to rebut the dissent's argument that the *Van Gorder* result will serve to discourage an ex-spouse who is receiving maintenance from remarrying. A maintenance recipient's remarriage terminates his or her support payments.[99] A maintenance recipient's careful cohabitation may not. *Van Gorder* may in fact discourage remarriage. The recipient has little to lose and much to gain by cohabiting. Fear of criminal prosecution is minimal; the statutes are rarely enforced.[100] Proof of cohabitation and what constitutes incidents of it may also be difficult. And, as *Van Gorder* clearly shows, cohabitation is not enough. The supporting ex-spouse must prove the former spouse's financial needs have changed. A cohabiting couple's careful manipulating of their financial arrangement could make this proof very difficult.

VI. CONCLUSION

The newly reformed Family Code emphasizes the financial aspects of divorce and abolishes fault as a consideration. The purpose of maintenance is not to punish,[101] but

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97. Van Gorder v. Van Gorder, 110 Wis. 2d 188, 199, 327 N.W.2d 674, 679 (1983).

98. *See generally* Martinson v. Brooks Equip. Leasing, Inc., 36 Wis. 2d 209, 223, 152 N.W.2d 849, 856 (1967) (one seeking equitable relief must have clean hands). But see Souzzo v. Souzzo, 16 N.J. Misc. 475, __, 1 A.2d 930, 932 (1938), where the court stated:

> Nor is the petitioner's right to alimony defeated by invoking the doctrine of "unclean hands." Equity does not repel all sinners. . . . Petitioner was absolved from all marital obligation to defendant by her decree for absolute divorce. Save as a member of the public she owed him no duty to lead a virtuous life.

99. WIS. STAT. § 767.32(3) (1981-1982).

100. *See* Fineman, *supra* note 11, at 285-98 (results of empirical study pertaining to prosecutors' enforcement of the cohabitation statute).

101. *See, e.g.*, Foregger v. Foregger, 48 Wis. 2d 512, 527-28, 180 N.W.2d 578, 586

rather to support and rehabilitate a divorced spouse.[102] These purposes are properly embodied in the Wisconsin maintenance statute.[103] The Wisconsin Supreme Court accurately applied these statutes in *Van Gorder v. Van Gorder*. The *Van Gorder* decision, consistent with the Wisconsin divorce statutes, emphasizes the financial situation of the parties and gives no recognition to concepts of fault or misconduct. But although the decision and its reasoning are based on sound legal grounds, the actual result may violate public policy. It is one thing to assert that the public's morals have changed and that cohabitation is acceptable; it is entirely another thing to state that the public's morals have changed to the extent that it is acceptable for an ex-spouse to cohabit at the expense of a former spouse.[104]

The legislature should consider passing a statute to deal with the problem. A statute modeled after the California statute[105] would be consistent with Wisconsin law in that its primary emphasis is the financial circumstances of the parties. By shifting the burden of proof so that the cohabiting spouse must convince the court of no change in financial circumstances, the proof difficulties discussed above are eased. The statute presents a middle ground; it emphasizes the financial requirements necessary for maintenance modification and neither discourages second marriages nor encourages illegal conduct.

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(1970); Tonjes v. Tonjes, 24 Wis. 2d 120, 126, 128 N.W.2d 446, 450 (1964) (alimony should not be awarded or adjusted for punitive purposes).

102. Section 1(2) of the Divorce Reform Act, ch. 105, 1977 Wis. Laws 560, sets forth the legislative purpose:

> It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage, insofar as this is possible, and may receive additional education where necessary to permit the spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

103. WIS. STAT. § 767.26 (1981-1982).

104. *See, e.g.*, Boyd, *Court's Cohabitation Decision Strikes Sparks*, Milwaukee Sentinel, Jan. 7, 1983, at 8, col. 1 (informal poll conducted in Milwaukee on day following *Van Gorder* decision reveals negative views of result).

105. *See supra* note 41.